Office - Supreme Court, U.S.
FILED
OCT 14 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 82-185, 82-246, 82-259.

In the Supreme Court of the United States,

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

JAMES S. DITTMAR,
WIDETT, SLATER & GOLDMAN,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200
Counsel of Record for Respondents.

Of Counsel:
JUDITH BERNSTEIN TRACY,
PEGGY A. WIESENBERG,
LAWYERS' COMMITTEE FOR CIVIL RIGHTS
UNDER LAW OF THE BOSTON BAR ASSOCIATION,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1145

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented.

Does a federal court, previously having found racial discrimination in employment practices, have the power to modify its prior remedial orders in light of new and unforeseen circumstances in order to bar seniority-based layoffs which would substantially eradicate progress achieved to date by ongoing remedial measures designed to achieve integration of a city's police and fire departments?

Table of Contents.

Opinions below	1
Statutes involved	2
Statement of the case	2
Prior proceedings	2
The police case	2
The fire case	5
Statement of the facts	7
The District Court's decision	9
The Court of Appeals' opinion	10
Reasons for denying the writ	11
A. The Court of Appeals' decision was consistent with traditional principles governing the exercise of discretion to modify prior remedial decrees in light of new and changed circumstances	11
B. The decision of the Court of Appeals does not conflict with decisions of other Courts of Appeals	15
C. The decision of the Court of Appeals does not conflict with decisions of the Court	17
Conclusion	22

Table of Authorities Cited.

Cases.

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)	12
American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364 (April 5, 1982)	17n
Bolden v. Pennsylvania State Police, 73 F.R.D. 370 (E.D. Pa. 1976), aff'd 578 F.2d 912 (3d Cir. 1978)	13

Boston Chapter, N.A.A.C.P., Inc., v. Beecher, 371 F.Supp. 507 (D. Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), cert denied, 421 U.S. 910 (1975); 423 F.Supp. 696 (D. Mass. 1976); 679 F.2d 965 (1982) 4, 6, 10, 11, 12 et seq.

Bridgeport Guard., Inc. v. Members of the Bridgeport C. S. Comm'n, 482 F.2d 1333 (2d Cir. 1973) 14

Brown v. Neeb, 644 F.2d 551 (6th Cir. 1981) 13, 15

Castro v. Beecher, 334 F.Supp. 930 (D. Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D. Mass. 1973); 386 F.Supp. 1281 (D. Mass. 1975); 522 F.Supp. 873 (D. Mass. 1981) 2, 3, 4, 9, 12 et seq.

Chance v. Bd. of Ed. Etc., 534 F.2d 993, (2d Cir. 1976), cert. denied, 431 U.S. 965 (1977) 16

Detroit Police Officers' Ass'n. v. Young, 608 F.2d 671 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981) 14

E.E.O.C. v. American Tel. and Tel. Co., 556 F.2d 167 (3d Cir. 1977), cert. denied, 438 U.S. 915 (1978) 20

Exxon Corp. v. Texas Motor Exchange of Houston, 628 F.2d 500 (5th Cir. 1980) 13

Franks v. Bowman Transporation Co., 424 U.S. 747 (1976) 16, 17, 19

Hutto v. Finney, 437 U.S. 678 (1978) 14, 15

Jersey Cen. Pow. & Li. Co. v. Local Un. 327, etc. of I.B.E.W., 508 F.2d 687 (3d Cir. 1975), cert. denied, 425 U.S. 998 (1976) 15, 15n

Lemon v. Kurtzman, 411 U.S. 192 (1973) 13

Louisiana v. United States, 380 U.S. 145 (1965) 12

Milliken v. Bradley, 433 U.S. 267 (1977) 14, 16

National League of Cities v. Usery, 426 U.S. 833 (1976) 20, 21

Perrotte v. Percy, 489 F.Supp. 212 (E.D. Wisc. 1980) 13

Pullman-Standard v. Swint, 50 U.S.L.W. 4425 (April 5, 1982) 17n

Smith v. Missouri Pac. R. Co., 615 F.2d 683 (5th Cir. 1980) 20

Steelworkers v. Weber, 443 U.S. 193 (1979) 18

Stotts v. Memphis Fire Dept., 679 F.2d 541 (6th Cir. 1982) 15

Swann v. Board of Education, 402 U.S. 1 (1971) 16

System Federation v. Wright, 364 U.S. 642 (1961) 12, 13, 20

Teamsters v. United States, 431 U.S. 324 (1977) 17, 17n, 19

United States v. Armour & Co., 402 U.S. 673 (1971) 13

United States v. City of Miami, Fla., 614 F.2d 1322 (5th Cir. 1980) 18

United States v. Swift & Co., 286 U.S. 106 (1932) 12

United States v. United Shoe Corp., 391 U.S. 244 (1968) 11, 12, 13, 16

University of California Regents v. Bakke, 438 U.S. 265 (1978) 17, 20

Washington v. Davis, 426 U.S. 229 (1976) 20

Waters v. Wisconsin Steel Works of Int. Harvester Co., 502 F.2d 1309 (7th Cir. 1974), cert. denied, 425 U.S. 997 (1976) 15, 15n

Watkins v. United Steelworkers of Am., Local No. 2369, 516 F.2d 41 (5th Cir. 1975) 15, 15n

STATUTES.

Massachusetts General Laws c. 31, § 39 2, 8

1982 Massachusetts Acts, c. 190, § 25 14n

42 U.S.C.
§ 1981 2, 5, 15, 16
§ 1983 2, 15, 16
§ 2000e 2, 17

MISCELLANEOUS.

The Boston Globe, August 10, 1981 14n

Nos. 82-185, 82-246, 82-259.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

Brief of Respondents in Opposition to Petitions for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the court of appeals is reported at 679 F.2d 965. The opinion of the district court is reported at 522 F.Supp. 873. Both opinions are reproduced in the appendices to the petitions.

Statutes Involved.

These actions involve the interplay of Massachusetts General Laws c. 31, § 39 and court orders providing remedies for violations of 42 U.S.C. §§ 1981 and 1983 and the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), *et seq.* These statutes are also reproduced in the appendices to the petitions.

Statement of the Case.

Prior Proceedings.

These petitions seek review of two actions which had been consolidated for decision below. The actions have lengthy histories. One case relates to the Boston Police Department, the other to the City's Fire Department.[1]

The Police Case.

The police action was commenced in 1970 by unsuccessful black and hispanic candidates for appointment as Boston police officers. Plaintiffs claimed racial discrimination, in violation of 42 U.S.C. §§ 1981 and 1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Police Department as well as other appointing authorities subject to Massachusetts civil service regulations. *Castro* v. *Beecher*, 334 F.Supp. 930, 934 (1971).

---

[1] The police case, entitled below *Castro* v. *Beecher*, was previously reported at 334 F.Supp. 930 (D.Mass. 1971); 459 F.2d 725 (1st Cir. 1972); 365 F.Supp. 655 (D.Mass. 1973); and 386 F.Supp. 1281 (D.Mass. 1975). The fire case, entitled below *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, was previously reported at 371 F.Supp. 507 (D.Mass. 1974); 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); and 423 F.Supp. 696 (D.Mass. 1976).

Following trial, the district court found that the Massachusetts civil service police entrance examination discriminated against minorities, including plaintiffs, who did not share "the prevailing white culture." *Id.* at 935-36, 943. On appeal the Court of Appeals for the First Circuit held that the civil service examinations were racially discriminatory. *Castro* v. *Beecher*, 459 F.2d 725, 730-31 (1st Cir. 1972). The court of appeals remanded the case with instructions that the district court enter a remedial order which "will yield a significant increment of black and Spanish-surnamed police officers in the near term" and insisted that relief fashioned by the district court "is to be more than token." *Id.* at 737.

On remand the district court exhorted the parties to agree upon a consent decree. The court observed:

> there is a *prima facie* presumption that on a job-related examination which is reasonably set to meet merely the requirements (and not something above the requirements) of a police patrolman's job, the percentage of successful black and Spanish-speaking persons who would choose to be patrolmen and who also would meet the requirements of the job would nearly approximate the percentage of blacks and Spanish-speaking persons in the population of the Commonwealth.

Castro v. *Beecher*, 365 F.Supp. 655, 665 (1973).

Shortly thereafter, the district court approved a comprehensive consent decree, which provided, among other measures, for the establishment of civil service certification priority pools, consisting of black and hispanic applicants, and for the implementation of affirmative recruitment programs aimed at black and hispanic applicants. *Id.* at 660-662.

In 1975 plaintiffs brought another action, pursuant to the All Writs Act, 28 U.S.C. § 1651, in order to clarify and pre-

serve the effect of the district court's decree in light of litigation which had taken place in the Massachusetts courts relating to the appointment of police officers in accordance with statutory preferences. The district court held that statutory preferences were displaced by the prior decree only to the extent that the preferences must be applied within the several priority pools established by the decree. *Castro* v. *Beecher*, 386 F.Supp. 1281, 1285 (1975). The district court requested that the parties agree upon a substitute consent decree and recommended the comprehensive remedy adopted in the meantime in the fire case, *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 371 F.Supp. 507, *aff'd*, 504 F.2d 1017 (1975). *Id.* 386 F.Supp. at 1286.

Thereafter the parties entered into a further consent decree, which was approved by the district court on July 7, 1975. The decree required various measures, including certification of police applicants by methods designed to facilitate the appointment in the cities of Boston and Springfield of one minority police officer for each white police officer and to facilitate the appointment by other appointing authorities on a ratio of one to three. The decree provided that its remedial measures shall apply to any city or town which has a minority population of one percent or more until the police force of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community."

On July 13, 1976 and on June 1, 1979, the district court entered supplemental decrees. These decrees required various continuing remedial measures. They also discharged from further judicial supervision the police departments of numerous cities and towns which had attained the proportional representation parity target according to current census statistics.

Certification of police applicants following each succeeding civil service examination has been the subject of negotiation between the parties. Consequently, the district court has never

been called upon to approve or disapprove the examinations administered following the original decree. Indeed, but for these negotiated adjustments, operation of the revised examinations would have maintained the racial exclusivity of Boston's Police Department.

In the spring of 1981, when the Boston Police Department embarked upon a program of massive reductions in force, plaintiffs filed a motion to modify prior remedial orders. Prompt funding legislation led to a temporary rescinding of the layoff program, and plaintiffs' motion was continued. After the program was reinstituted several months later, the district court held a hearing on plaintiffs' motion, together with a similar motion in the fire case. On August 7, 1981 the district court issued an opinion and order enjoining the Boston Police Department from reducing, pursuant to a program of reductions in force, the percentage of minority officers below the level obtaining at the commencement of the program.

Appeals by state civil service officials and the police union intervenor followed. The Boston Police Commissioner, however, did not appeal. On May 11, 1982 the court of appeals affirmed.

The Fire Case.

The fire case was commenced in 1972 by the N.A.A.C.P. and unsuccessful black and hispanic applicants for appointment as Boston firefighters. As in the police case, plaintiffs claimed racial discrimination, in violation of 42 U.S.C. §§ 1981 and 1983, in connection with recruitment and certification practices established by the Massachusetts Civil Service Commission and implemented, through appointment procedures, by the Boston Fire Department as well as other appointing authorities. In 1973 the Attorney General of the United States brought an action raising similar claims, together with Title VII claims, and the two actions were consolidated.

Following trial, the district court found that plaintiffs had been victims of racial discrimination. *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 371 F.Supp. 507, 514 and 517. The district court then issued a remedial order designed to eliminate the "present effects of past discrimination." *Id.* at 520. The district court ordered a program of affirmative recruitment of minority firefighters, enjoined further use of the civil service firefighters entrance examination, ordered development of a job-related examination and required establishment of priority certification groups for black and hispanic applicants. *Id.* at 520-23. The district court ordered that the remedial measures remain in force for any city or town with a minority population greater than one percent until the fire department of the municipality "achieves a complement of minorities commensurate with the percentage of minorities within the community . . . ." *Id.* at 523.

Appeal followed. Relying substantially on its earlier opinion in the police case, 459 F.2d 725, the court of appeals affirmed. *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974). On the subject of remedy, the court of appeals noted that in the police case it had required the district court to institute remedial measures "as a means of ameliorating the continuing effects of past discrimination . . . ." *Id.* at 1026. The court of appeals found the remedial measures went "no further than to eliminate the lingering effects" of discrimination. *Id.* at 1027. This Court denied a petition for certiorari. 421 U.S. 910.

Subsequent to the 1974 decree, the district court entered several further consent decrees and stipulations to effectuate its original order. These orders set procedures for administration of new exams, establishment of eligibility lists, affirmative recruitment, appointments and notice and reporting. As in the police case, ongoing judicially approved negotiation of certification measures has obviated any need for judicial ap-

proval or disapproval of the examinations administered following the original decree.

In the spring of 1981, upon commencement of the City's reduction in force program, plaintiffs filed a motion to modify prior remedial orders. As in the police case, proceedings were continued; a consolidated hearing was held on July 30, 1981; the district court's opinion and order issued on August 7, 1981; and appeals followed. As in the police case, the Boston Fire Commissioner did not appeal. On May 11, 1982 the court of appeals affirmed.

Statement of Facts.

At the time these actions were originally brought, racial discrimination had led to virtual exclusion of blacks and hispanics from Boston's Police and Fire Departments. In 1970, only 65 of 2,805 police officers were black or hispanic, representing but 2.3 percent of the total. In the same period 18 of 1,983 firefighters were black or hispanic, representing a mere 0.9 percent of the total. On the other hand, the minority population of Boston was more than 16 percent in 1970 and approximately 23 percent by 1974.

Between 1974 and 1980 the district court's remedial orders in both cases produced substantial progress toward elimination of the effects of past discrimination. During that period, the Boston Police Department hired 492 officers, of whom 213 (representing 43 percent) were black or hispanic. In consequence, on July 6, 1981, 224 of a total 1,912 officers were black or hispanic, and minority representation had risen to 11.7 percent. During the same period, the Boston Fire Department hired 553 sworn personnel, of whom 248 (representing 45 percent) were black or hispanic. In consequence, on

July 7, 1981, 248 of a total 1,690 firefighters were black or hispanic, and minority representation in that department had risen to 14.7 percent.

By 1980, however, the black and hispanic population of the city had risen to between 29 and 30 percent.

In early July 1981, at the outset of the City's 1982 fiscal year, the Boston Police and Fire Departments commenced a systematic program of reductions in force of sworn personnel. The program was initiated for asserted reasons of fiscal necessity. At the time, the mayor, the city council and elected state officials were involved in dispute and had suspended negotiations regarding the City's fiscal affairs. The City's program was to be accomplished by six weekly waves of layoffs, running from early July to mid-August.

The Police and Fire Departments intended to implement these layoffs in accordance with the Massachusetts civil service statute, Mass. Gen. Laws c. 31, § 39, which requires separations from service in reverse order of seniority. The layoff program consequently threatened to produce a devastating reduction in the number of black and hispanic officers on both forces. The Police Department set out to lay off 252 officers, of whom 122 were black or hispanic. Of the officers to be laid off, 48 percent were minority. More strikingly, 54.5 percent of the Department's entire complement of minority sworn officers was to be dismissed. The Fire Department set out to lay off 207 officers, of whom 113 were black or hispanic. Of the firefighters to be terminated, 54.6 percent were minority officers, and the layoff program was to eliminate 45.6 percent of all minority members of the force.

If the program had been implemented, minority representation in both the Police and Fire Departments would have plunged profoundly in six weeks. By mid-August only 103 of 1,660 police officers would have been black or hispanic, and minority representation in the department would have fallen

from 11.7 percent to 6.2 percent. By mid-August only 135 of 1,483 firefighters would have been black or hispanic, and minority representation in that department would have dropped from 14.7 percent to 9.1 percent. In six weeks approximately half of the officers in each Department hired pursuant to the district court's prior decrees would have been fired.

Moreover, although as of July 30, 1981 City officials intended to proceed with only six waves of layoffs, there was no certainty that additional programmatic terminations would not occur, further eroding minority representation.

The District Court's Decision.

In its August 7, 1981 opinion, the district court found that "the massive firings claimed by municipal authorities to be the result of the voters enacting Proposition 2½ amount to 'new and unforeseen conditions' . . . ." *Castro* v. *Beecher*, 522 F.Supp. 873, 877 (1981). The district court noted that, in light of the remedial objective of the prior decrees, "if anything similar to Proposition 2½ had been in effect at the time that the remedial decrees were originally entered, these decrees would have been fashioned to make allowances for terminations so that the minority representation in both departments could have been maintained if not increased notwithstanding the then hypothetically ongoing terminations." *Id.* at 877. The district court also concluded that denial of the relief sought would reverse the results of the court's prior remedies, would "allow the substantial eradication of all progress made by blacks and hispanics" in securing positions as police officers and firefighters and would produce a "grievous wrong." *Id.* at 877. Accordingly, the district court enjoined the Boston Police Commissioner and Fire Commissioner from reducing, pursuant to any departmental or City program of reductions in force, the percentage of minority officers obtaining at the commencement of the program. *Id.* at 877.

The Court of Appeals' Opinion.

In affirming the district court, the court of appeals first concluded that the district court had the power to modify its prior remedial orders. The court of appeals observed that the cases involve "shaping ongoing relief so as to eliminate the *condition* precipitating the original decrees" — namely, "gross discriminatory underrepresentation" of minorities in the Police and Fire Departments. *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d 965, 972 (1982). (Emphasis in original.) In light of the City's reduction in force program, "there was ample showing that changed circumstances would totally vitiate the intended effect of the original decrees unless the proposed modifications were made. . . . Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees." *Id.* at 972.

Second, the court of appeals found, in the decisions of this Court addressing challenges to the lawfulness of bona fide seniority systems, nothing that "precludes a court from ordering relief to remedy discrimination that exists apart from the adoption or application of a bona fide seniority system." *Id.* at 974. The court of appeals found that no decision of this Court applies to the "basic issue" here — namely, "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority-based layoffs." *Id.* at 974-75. The court concluded that "[t]o hold a seniority system inviolate in such circumstances would make a mockery of the equitable relief already granted." *Id.* at 975.

Finally, the court of appeals found that maintenance of the present percentage representation of minorities in the Police and Fire Departments "without regard to whether the individuals comprising the minority percentage were the actual victims of past discrimination", *id.* at 975, did not entail unconstitutional reverse discrimination. The court of appeals noted

that remedial relief from the effects of past discrimination may require use of "minority-conscious percentage goals and quotas" and observed that the original relief was "not for individuals, but to correct a condition of racial imbalance." *Id.* at 976. The court of appeals identified the issue as "whether the progress made to date in integrating the departments will be preserved." *Id.* at 977. The district court's order to accomplish this result did not "unnecessarily trammel" the interests of white officers, served the public interest and was reasonable. *Id.* at 977-78.

Reasons for Denying the Writ.

These petitions challenge the power of a federal court to prevent the substantial eradication of relief achieved by ongoing judicial remedy in cases involving discriminatory exclusion of racial minorities from the Police and Fire Departments of the City of Boston. The petitions urge the Court to find decisional conflicts where there are none in order to adopt rules of law strictly limiting the discretionary scope of judicial remedies, prohibiting remedies addressed to conditions caused by discrimination and precluding judicial protection of the fruits of its own remedial measures.

A. THE COURT OF APPEALS' DECISION WAS CONSISTENT WITH TRADITIONAL PRINCIPLES GOVERNING THE EXERCISE OF DISCRETION TO MODIFY PRIOR REMEDIAL DECREES IN LIGHT OF NEW AND CHANGED CIRCUMSTANCES.

The district court had inherent power to modify equitable relief to adapt to new or changed circumstances. *United States*

v. *United Shoe Corp.*, 391 U.S. 244, 251 (1968); *System Federation* v. *Wright*, 364 U.S. 642, 647-48 (1961). "A continuing decree of injunction directed at events to come is subject always to adaptation as events may shape the need. . . . The result is all one whether the decree has been entered after litigation or by consent." *United States* v. *Swift & Co.*, 286 U.S. 106, 114 (1932). Equitable relief is a matter within the sound discretion of the district court, and subsequent modification of such relief requires perforce wide discretion. *System Federation* v. *Wright*, *supra*, 364 U.S. at 647-48.

These are cases, moreover, of racial discrimination. Discrimination having been found, the remedial power of the district court is broad: "[W]here racial discrimination is concerned, the '[district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) (quoting *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965)). The district court's prior remedial orders sought, of course, to eliminate the effects of past discrimination. They were framed to accomplish, through various measures, the integration of Boston's Police and Fire Departments.

Against this background, the City's program of massive layoffs posed an unforeseen threat to the ongoing remedy. The district court found that failure to modify the prior remedial orders would allow the "substantial eradication of all progress" made in integration of the Police and Fire Departments since the commencement of the litigation. *Castro* v. *Beecher*, 522 F.Supp. at 877. The court of appeals agreed: "Failure to take the action here challenged would result in undoing most all that had been accomplished by the original decrees." *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d at 972.

In these circumstances, the district court's recent order was proper, for an equitable remedy may be modified, in light of

new circumstances, in order to achieve its own purpose. *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971); *United States* v. *United Shoe Corp.*, *supra*, 391 U.S. at 249, 251-52. Modification is warranted when "time and experience" demonstrate that the original decree has "failed to accomplish" its intended result. *United States* v. *United Shoe Corp.*, *supra*, 391 U.S. at 249; see *System Federation* v. *Wright*, *supra*, 364 U.S. at 647.

Likewise, modification of the district court's prior decrees was appropriate in order to prevent the substantial undoing of such remedy as had already been achieved. *Brown* v. *Neeb*, 644 F.2d 551, 560 (6th Cir. 1981); *Perrotte* v. *Percy*, 489 F.Supp. 212, 214 (E.D.Wisc. 1980); *Bolden* v. *Pennsylvania State Police*, 73 F.R.D. 370, 372 (E.D.Pa. 1976), *aff'd*, 578 F.2d 912 (3rd Cir. 1978); see *Exxon Corp.* v. *Texas Motor Exchange of Houston*, 628 F.2d 500, 503 (5th Cir. 1980).

The lower courts' decisions, moreover, reflect the sensitive weighing of practicalities and balancing of public and private interests which are the hallmarks of equity. As this Court has often noted: "in constitutional adjudication as elsewhere, equitable remedies are a special blend of what is necessary, what is fair, and what is workable. 'Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs.'" *Lemon* v. *Kurtzman*, 411 U.S. 192, 200 (1973). (Footnotes and citation omitted.)

First of all, the district court confined its order to a narrow compass. The order prohibited only the reduction of current minority representation. It did not prohibit layoffs of sworn personnel altogether. It neither banned the layoff of all minority officers, nor ordered an increase in minority representation. The order did not require any measures of affirmative action or mandate that white officers be replaced by new minority hirees. The decree set no permanent employment

quota and ordered no permanent maintenance of specified minority representation. It only barred a reduction in minority representation which would be occasioned by the City's proposed response to a particular asserted exigency.

Additionally, the district court's order did not overbear "the interests of state and local authorities in managing their own affairs . . . ." *Milliken* v. *Bradley*, 433 U.S. 267, 281 (1977). It neither prohibited reductions in force nor prescribed staffing levels. It dictated no internal personnel matters such as assignment, ranking and the like. It left the ongoing political process to the politicians and took no steps which would compel solutions or limit options.[3] It mandated no expenditure of public funds. Notably, indeed, neither the Police Commissioner nor the Fire Commissioner opposed plaintiffs' motions; nor did they appeal. *Cf. Hutto* v. *Finney*, 437 U.S. 678, 688 (1978).

Indeed, as the court of appeals concluded, the district court's order served the pressing public interest of maintaining integrated public safety departments in a major city with a large minority population. *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 679 F.2d at 977-78. *Accord, Bridgeport Guard., Inc.* v. *Members of the Bridgeport C. S. Comm'n*, 482 F.2d 1333, 1341 (2nd. Cir. 1973); *Detroit Police Officers' Ass'n* v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981).

The district court has had years of experience with the problems presented by these cases. As in the past, it remained sensi-

---

[3]In fact, immediately following the district court's decision, state and municipal officials renewed political negotiations looking to resolve the City's asserted fiscal crisis. *The Boston Globe*, August 10, 1981, p. 1, col. 3. Subsequently, legislation was passed reflecting political compromises among various public officials, alleviating budgetary pressures upon the Police and Fire Departments and directing the re-hiring of laid-off officers. See 1982 Mass. Acts, c. 190 (June 8, 1982).

tive to the limitations upon the powers of the federal court. For these reasons its exercise of discretion is entitled to "special deference." *Hutto* v. *Finney, supra*, 437 U.S. at 688.

B. The Decision of the Court of Appeals does Not Conflict with Decisions of Other Courts of Appeals.

In asserting that the decision of the court of appeals conflicts with decisions of other courts of appeals, petitioners urge the Court to find conflict where there is none and to rule on an issue which is not raised by the decision below.

No authority cited by petitioners to show circuit court conflict addressed what was the "basic isssue" below — namely "the power of a court in a litigated discrimination case to ensure that relief already ordered not be eviscerated by seniority based layoffs." 679 F.2d at 974-75. The power of the court to preserve its prior remedy in the face of sudden, massive and unanticipated layoffs is what was decided below. On this issue the courts of appeals do not conflict; they are, rather, in harmony. *See Stotts* v. *Memphis Fire Dept.*, 679 F.2d 541 and 579 (6th Cir. 1982); *Brown* v. *Neeb, supra*.

Petitioners argue that the decision of the court of appeals conflicts with decisions of other courts of appeals sustaining bona fide seniority systems from attack under Title VII and 42 U.S.C. §§ 1981 and 1983. The conflict, however, is illusory. Three of these cases, *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, *Jersey Cen. Pow. & Li. Co.* v. *Local Un. 327, etc. of I.B.E.W.* and *Watkins* v. *United Steelworkers of Am., Local No. 2369*,[3] dealt with frontal assaults on the validity of

[3] *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); *Jersey Cen. Pow. & Li. Co.* v. *Local Un. 327, etc. of I.B.E.W.*, 508 F.2d 687 (3rd Cir. 1975), *cert. denied*, 425 U.S. 998 (1976); and *Watkins* v. *United Steelworkers of Am., Local No. 2369*, 516 F.2d 41 (5th Cir. 1975).

seniority systems. The fourth, although arising in a somewhat different context, posed precisely the same question: "does a facially neutral excessing plan, which operates on the concept of 'last hired-first fired,' discriminate against minorities who are disproportionately affected?" *Chance* v. *Bd. of Ed. Etc.*, 534 F.2d 993, 997 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977). This was not the issue faced by the court of appeals below; consequently its decision neither resolved that question nor conflicted with the holdings of other courts of appeals on that point.

Respondents did not seek, and did not need to seek, from the courts below a determination of the invalidity of the Massachusetts seniority statute because of any discriminatory impact of its operation. Respondents did not seek to establish a separate violation of Title VII or of 42 U.S.C. §§ 1981 or 1983 by reason of the City's layoff program. Rather, they sought to modify relief based upon an adjudication of liability already rendered on other grounds.

"Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann* v. *Board of Education*, 402 U.S. 1, 15 (1971). *See Milliken* v. *Bradley*, *supra*, 433 U.S. at 282. The civil service statute need not have been challenged directly for the district court to have ordered a remedy affecting seniority. Remedial law, may, after all, place greater restrictions on primary activity than does the substantive law which is violated. *See Swann* v. *Board of Education*, *supra*, 402 U.S. at 17; *United States* v. *United Shoe Corp.*, *supra*. Employee expectations based upon a seniority system are not vested rights. Those expectations may be modified, as by statute or by revision of the collective bargaining agreement. They may be modified "to the end of ameliorating the effects of past racial discrimination . . . ." *Franks* v. *Bowman Transportation Co.*, 424

U.S. 747, 778-79 (1976). Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which figures so importantly in the decisions of other courts of appeals in upholding seniority systems from direct attack, does not bar relief affecting seniority once illegal discrimination is otherwise found to have occurred. *Franks, supra* at 758; *see Teamsters* v. *United States*, 431 U.S. 324, 347 (1977).

C. The Decision of the Court of Appeals does Not Conflict with Decisions of this Court.

In asserting that the decision of the court of appeals conflicts with decisions of this Court, petitioners likewise urge the Court to find conflict where there is none.

The decision below does not conflict with decisions of this Court[4] upholding the validity of facially neutral seniority systems despite their disproportionate impact upon recently hired minority employees. This asserted decisional conflict is illusory. The court of appeals was not asked to find, and did not hold, that the Massachusetts civil service statute was invalid. Its operation, rather, was superseded in order to effect, and to preserve, an ongoing remedy based upon prior adjudication of liability on other grounds. *See supra* p. 10.

The decision of the court of appeals also does not conflict with decisions of this Court relating to remedies for racial discrimination. The use of racial classifications and goals as valid remedies for violation of constitutional rights is well established. *See University of California Regents* v. *Bakke*, 438 U.S. 265, 300-02 (1978) (Powell, J.).

---

[4] *Pullman-Standard* v. *Swint*, 50 U.S.L.W. 4425 (April 5, 1982); *American Tobacco Co.* v. *Patterson*, 50 U.S.L.W. 4364 (April 5, 1982); *Teamsters* v. *United States, supra*.

> At this point in the history of the fight against discrimination, it cannot be seriously argued that there is any insurmountable barrier to the use of goals or quotas to eradicate the effects of past discrimination. . . . To the contrary, affirmative relief is *required* to ensure that the effects of past discrimination are negated.

United States v. *City of Miami, Fla.*, 614 F.2d 1322, 1335-1336 (5th Cir. 1980). (Emphasis in original.) (Footnote and cites omitted.)

A racial preference measure is reasonable, and therefore lawful, when it substantially contributes to remediation of prior discrimination without unnecessarily trammeling the interests of white employees. *Steelworkers* v. *Weber*, 443 U.S. 193, 208 (1979). In *Weber* this Court found a voluntary, nonjudicial affirmative action plan permissible where the plan did not require the discharge of white workers and their replacement with new black hirees, did not create an "absolute bar" to the advancement of white employees and was a "temporary measure . . . not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance." *Id.* at 208. The district court's orders here satisfy these criteria. The orders did not require the discharge of white officers and their replacement with new minority officers. Indeed, the orders did not mandate the discharge of anyone. Neither did they require the hiring of new minority officers; nor did they compel any proportionate gain in minority representation. The orders did not erect any bar, let alone an absolute bar, to white advancement. All matters of advancement and promotion, as well as retention, reduction in force and reinstatement, were left in the hands of the municipal authorities. The district court's orders were maintenance orders only; they preserved the status quo. The orders also were temporary. They responded

to, and were directed at, a specific program which the City's officials claimed was necessitated by sudden fiscal exigency. The district court did not mandate permanent maintenance of current minority representation, did not prohibit fluctuation in minority representation occasioned by circumstances other than the immediate reduction in force program and did not bar eventual reinstatement of both white and minority officers with restoration of original seniority status.

There is no conflict with decisions of this Court due to the fact that the district court's order prevented the discharge of minority officers who had not, individually, demonstrated that they were victims of discrimination. The issue decided below concerned the power of a federal court to protect the fruits of prior affirmative action remedies which had been based upon adjudications of discriminatory exclusion of racial minorities from public employment. As the court of appeals noted, this case "does not involve an award of constructive seniority. . . ." Consequently, decisions such as *Franks* v. *Bowman Transportation Co., supra* and *Teamsters* v. *United States, supra,* which address the scope of "rightful place" constructive seniority remedies available under Title VII to individual victims of discrimination, are not on point. The district court ordered maintenance of current minority representation in the face of a claimed exigent need to lay off half of the black and hispanic officers hired pursuant to prior remedial measures. The district court did not decree a re-ordering of rankings for all competitive and benefit seniority purposes. Those rankings were left undisturbed for all purposes, save implementation of the massive reduction in force program, and they have apparently been resumed upon reinstatement of all terminated officers following solution of the City's fiscal difficulties. Indeed, in light of the ultimate solution, there remains no lasting benefit accorded to minority officers by the district court's decree and no lasting burden, relating to seniority rank-

ing, imposed upon non-minority officers. See 1982 Mass. Acts, c. 190, § 25.

Exclusion of minorities from the Police and Fire Departments having been established, and racial discrimination having been found, the district court's relief was not limited to measures benefiting only officers demonstrating individual victimization. Race-conscious relief "does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." *University of California Regents* v. *Bakke*, *supra*, 438 U.S. at 363 (Brennan, J.). Where there has been discriminatory racial exclusion from employment opportunity, class relief, "without regard to the victim status of every class member," is appropriate. *E.E.O.C.* v. *American Tel. & Tel. Co.*, 556 F.2d 167, 177 (3rd Cir. 1977), *cert. denied*, 438 U.S. 915 (1978) (citations omitted).

Nor does the decision of the court of appeals conflict with *Washington* v. *Davis*, 426 U.S. 229 (1976). Establishing a right to modified relief does not require re-establishing liability. Not having set out to show further liability, plaintiffs need not have proved intentional discrimination and judgment having already entered, they need not have re-established their right to relief. *System Federation* v. *Wright*, *supra*, 364 U.S. at 647. These cases were tried on principles of law then widely accepted, and, as the court of appeals observed, it is by no means clear that the earlier decisions would have been different if decided after *Washington* v. *Davis*. In any event, petitioners' reliance upon *Washington* v. *Davis* amounts to little more than a collateral attack upon earlier judgments and a challenge to all ongoing relief. See *Smith* v. *Missouri Pac. R. Co.*, 615 F.2d 683, 685 (5th Cir. 1980).

Finally, the court of appeals' decision does not conflict with *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). The

Court in *Usery* was concerned only with reconciling broad congressional powers under the commerce clause with the reservation of states' rights under the Tenth Amendment. The decision does not address judicial remedies directed against racial discrimination under color of state law and is uninstructive on the only issue presented in this case — a court's power to fashion modified remedial relief in order to preserve accomplishments which prior orders have achieved.

These cases involved findings of discriminatory exclusion of racial minorities from public employment. Remedial measures designed to relieve the consequences of that exclusion and to accomplish integration have been implemented for several years. The decision of the court of appeals was based squarely on the history of prior proceedings and on the specific circumstances which newly posed a threat to the achievements of prior orders. The decision of the court of appeals rests on the unique character of these cases, and there is no conflict with decisions of this Court addressing other circumstances and other issues.

Conclusion.

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

JAMES S. DITTMAR,
WIDETT, SLATER & GOLDMAN,
Sixty State Street,
Boston, Massachusetts 02109.
(617) 227-7200
Counsel of Record for Respondents.

Of Counsel:

JUDITH BERNSTEIN TRACY,
PEGGY A. WIESENBERG,
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW OF
THE BOSTON BAR ASSOCIATION,
294 Washington Street,
Boston, Massachusetts 02108.
(617) 482-1145